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'In the Name of God, Amen' Seeking the Testator's Authentic Voice in Research Using Wills

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Abstract

A Will is a written document which represents a unique form of communication between the dead and the living (Finch et al 1996). This statement hints at the complex nature of the interpretation of wills. Wills are documents which have a unique power. No other document can communicate beyond the grave in the voice of the deceased with that same combination of legal and personal power. In turn the communication from the living back to the deceased takes the form of acceptance of their wishes and the turning of those wishes into concrete form in many cases. It is not a simple transference of will (in the personal sense) from one to the other; rather, the executor must operate on the will by taking it to court or by other transactions and the beneficiary may interact with the will by choosing whether to comply with conditions and by using his or her own desires to deal with the corporeal remainder of the deceased, their estate.

'In the Name of God, Amen'
Seeking the Testator's Authentic Voice in Research Using Wills 1

Prue Vines

Introduction

A Will is a written document which represents a unique form of communication between the dead and the living (Finch et al 1996).

This statement hints at the complex nature of the interpretation of wills. Wills are documents which have a unique power. No other document can communicate beyond the grave in the voice of the deceased with that same combination of legal and personal power. In turn the communication from the living back to the deceased takes the form of acceptance of their wishes and the turning of those wishes into concrete form in many cases. It is not a simple transference of will (in the personal sense) from one to the other; rather, the executor must operate on the will by taking it to court or by other transactions and the beneficiary may interact with the will by choosing whether to comply with conditions and by using his or her own desires to deal with the corporeal remainder of the deceased, their estate.

This means that studying wills, for whatever reason it is carried out -- whether for the purpose of understanding history or law or culture -- is the study of something which for all its appearance of stasis, is dynamic. The tension created by the dynamic between testator and beneficiary is one which classically counterposes force and resistance or force and submission. This is well illustrated by conditional wills and the responses of beneficiaries to those conditions. Wills are extensively used for social, legal and historical research because they are rich in data. As legal documents they are filed in archives and treated with respect. They are therefore some of the most available historical documents. Because they record a person's intentions in relation to the disposition of property they record both the property and many of their relationships. For this reason they are often used for projects considering kinship patterns and relationships as well as for descriptions of property people held at the particular time. At the same time, important ethical issues arise, because the will is not simply a document relating to someone who is dead and gone; it speaks to and about people who may be still living and it therefore raises many issues about the ethical treatment of living humans who seem at first glance to be only indirectly connected to the document which appears in front of the researcher.

The communication between the dead and the living requires some attention to the role of the living in this interaction -- both those the testator seeks to influence and the reader who is researcher. The reader who interprets wills as social documents must bring to the role a rich knowledge of context, both legal and social, if they are not to make serious misreadings of their texts.

My experience of using wills as data for legal research comes from two main projects - one using a range of early modern wills from a village in Norfolk in England, 2 and the other using 20th century wills from New South Wales. 3 Neither of these studies has yet been published. The Norfolk wills date from between 1400 and 1700. They all come from one village about which a considerable amount of information is available

from local historians. Data is available about the inhabitants from reports made by the priest to the Bishop when regular visitations occurred, and from other local documents. About 40 of these wills have so far been translated (the earlier ones) or transcribed. The New South Wales project compares a sample of wills from 1910 with a sample from 1995. There are 140 randomly chosen wills with their attendant documents such as death certificates and inventories of property. A great deal of social and legal information is available from the 20th century, making it much easier to avoid unwarranted mistakes in interpretation. Both these studies are historical, but because one is a relatively modern study, and the other involves much older documents the two studies illustrate some different ethical and research methodology issues about wills and the dialogue between the dead and the living.

Other wills studies range from studies done by historians for nonlegal purposes, such as the study by Wrightson and Levine, *Poverty and Piety in an English village* (1979; see also Vann 1979, Spufford 1974) to studies of wills which focus more clearly on the legal significance of the documents, whether historically or not. Examples of more legally oriented studies include Finch et al's study of English wills and inheritance patterns in contemporary Britain (1996; see also Powell & Looker 1930), and the studies by Lawrence Friedman (1964) and Shamma et al (1987) and others (see, inter alia, Powell & Looker 1930, MacFarlane 1978, Thirsk & Thompson 1976, Sussman et al 1970, Ward & Beuscher 1950, Brittain 1977, Deen 1972, Horwitz 1984). Examining these studies and my own suggests that the inferences to be drawn from wills may be rich and complex and research must be carried out carefully.

Methodological preliminaries

A number of basic issues of methodology have to be considered in relation to any form of research, and wills are no exception. Valid conclusions about the testator and the testator's communication with and about his or her society require careful consideration of methodological issues.

Access to wills

Wills are public documents and therefore may be relatively easy to get access to. In the English context, wills were kept in the registries of the church courts. They are now often kept in the Public Record Office of the particular jurisdiction. For example the records of the Prerogative Court of the Archbishop of Canterbury are now kept in the Public Record Office in London. But records are not necessarily comprehensive and in England they may be held in parish registers, and in county record offices. In Australia, with its shorter timeline, it is slightly easier as the Probate Registries keep the wills. However, wills made in the early colonies until about 1840 are extremely hard to find, and many will be irretrievably lost. In New South Wales, wills between 1849 and 1986 are kept on microfiche; the actual documents themselves from 1928 are kept at the Registry and the rest in various storage places. Costs therefore vary according to ease of retrieval and the desire of the court to make money from this sort of research (the fact that a will is a public document does not prevent the charging of considerable photocopy fees).

Representativeness of will-makers

Not everyone makes a will. Intestacy rates vary, but they are significant. In England in the mediaeval to early modern period nearly everyone made some sort of will because the church insisted on it (Helmholz 1987). Indeed there was a battle between the church and the common law about married women's capacity to make wills because the church insisted that they do so as part of the last rites (Vines 1997, Sheehan 1963). In practice married women often made wills with the consent of their husbands anyway. That is, he allowed her to give away what was legally his property (Glanvill 1965, 4 Holdsworth 1932). However, many of these wills were nuncupative (oral) and therefore the record is the probate record, produced from the testimony of witnesses, and may necessarily exclude some matters that might have been recorded in a written will.

In Australia the rate of intestacy is relatively low, but some groups such as Aborigines rarely make wills. 5 The following figures in New South Wales show the proportions of wills to letters of administration in 1910 and 1995 (figures from Knibbs 1912, Supreme Court of NSW Annual Report 1995, NSW Yearbook 1997, Trivett 1911).

	Deaths	death rate per 1,000	wills proved	letters of administration
1910	16,191	9.71	2,261	1,075
1995	44,773	7.3	19,902	1,454

Even these seemingly clear figures are problematic. The figures for deaths in 1910 include deaths at all ages, but those for 1995 deaths are only for persons over 20 years of age. In 1910, 4,563 of the reported deaths were of children under 5, leaving 11,628 over. Figures for intestacy do not include small estates, because those figures were not reported. Letters of administration granted in some cases will also have a will annexed, so this figure may also be slightly different from the actual intestacy figure. The intestacy figure only refers to estates large enough to be of significance, so the number of people dying without a will is clearly very much higher than the figure for letters of administration.

There are some other pitfalls here. At common law, minors may not make wills unless they are married or have the permission of the court. This rule has persisted for centuries although the age of majority has shifted. 6 This means minors' wills are relatively rare and so their views are less likely to be available in wills. Old people are disproportionately more likely to die having made a will and therefore a sample of wills is likely to be a sample relating to people older than the average in the population. Very old people are even more disproportionately likely to die leaving a will which is up to date (Finch et al 1996: 60). This again may skew the evidence available from wills.

Transcribing and translating old wills

As with any other documents there can be difficulties with reading wills. The worst documents can be the ones during the period 1940 to 1970 when paper was highly acidic and crumbled easily. Older paper was less acidic and therefore tougher. However, mediaeval and early modern wills were frequently written in Latin -- the 15th century Norfolk wills are in Latin, but by the 16th century they are in English. Even if

not in Latin the language can be difficult to understand. To add to the difficulties, scribes also frequently had their own pet abbreviations which must be learnt by the transcriber. None of these things are problems distinctive to wills. However, there are some small traps -- mediaeval wills would have numbers written in Roman numerals. To translate these into modern Arabic numerals seems straightforward, but may actually be a mistake of interpretation as Arabic numerals were regarded as the work of the devil for some time. For example, in the Norfolk wills there are no Arabic numerals until the 17th century. However, when this stopped being a religious prohibition and became a mere habit is difficult to know. So maintaining the numbers as either Arabic or Roman as they appear in the original is a significant research issue until that is established. If all we want is the number then that is not a problem, but if we are considering the maker of the will as a person speaking in a cultural context, then it is important to understand the significance of how the number is transcribed, because it would be culturally misleading to write the number as an Arabic numeral.

Sampling

The fact that wills survive in large numbers means that quantitative analysis can be done, with the possibility of large enough samples to create meaningful statistical data. It is easy to inadvertently skew one's sample with a wills study. For example, in the study of wills from NSW we wanted a random selection of testators' wills, and even numbers of men and women. We also sought to compare rural and urban testators. Various problems arose. For example, areas which were rural in 1910 are now urban, and it was easy to confuse these. Choosing a sample from each of the two years being compared required selecting them by date. First we had to decide which years to choose. Since we were interested in both attitudinal factors and demographic factors we had to consider timing since significant legislative and social changes had happened in a number of years as well as significant periods of sickness or mortality. We avoided 1906 when the plague hit Sydney because that might uncharacteristically alter the demographics. 1910 was chosen as a year which was well after the Married Womens' Property Acts were passed and had no particular excesses such as war or plague which we could identify. 1995 was chosen for similar reasons, being after the major reforms of 1989 to the Wills Probate and Administration Act 1898 (NSW) and well after the height of the AIDS epidemic, which again would skew age and situation of the sample. For each of the years chosen, testators were chosen from each month of the year, in order to have a spread of ages -- more old people die in winter than summer so we needed to cover the whole year. We tried to get matching death dates for our comparator wills in 1995 and 1910, but they are recorded differently at the Probate Registry. 1995 wills in NSW are recorded according to the date they were filed for probate on a computer database in the Registry. 1910 wills are recorded alphabetically by surname on microfiche in the Registry. The file includes information on the date of death. These files had to be scanned for the year in order to select the matching death dates from the 1995 list.

Other studies have had similar problems. Finch et al (1996) had a problem in a study they were doing looking at attitudes of people whose wills were probated in 1959, 1969, 1979 and 1989. The problem was that often people make wills 20 years or more before they die. They solved this problem by only taking wills whose testator had died within nine years of making the will, but this created another problem -- it tended to mean that more of the testators were elderly than would otherwise have been the case

(because the oldest testators are the ones most likely to die with a recent will). The researchers decided that they would just have to accept that problem, and take the more elderly nature of testators into account when considering attitudinal issues.

Who speaks -- the voice of the will

Wills speak from a social position; but they do not speak for a whole society. The individual testator speaks, thinking that those who read already understand. He or she does not explain what seems obvious to them in their time. There are therefore some significant pitfalls in drawing conclusions about society, culture or even law from wills. The following observations refer mainly to qualitative analysis of wills.

A will is a document which legally transfers property from the holder to another on death. Wills are particularly useful because they have been made for centuries by both the wealthy and the relatively poor (who otherwise may be undocumented). This is particularly significant in the common law countries where the doctrine of testamentary freedom held sway and where forced inheritance was not practised. However, even in civil law countries will-making was often used for part of the estate. In common law countries, wills are particularly useful because when they are made they have a strong tendency to deal with all or most of the property available, and to do it by naming the particular parts. Thus the will in a common law country is more likely to give a substantive picture of the deceased's estate than may be the case in a civil law country (which limits the property which can be passed in the will by the device of matrimonial property or limiting what may be freely willed) or indeed in countries where Islamic or Talmudic law controls the passage of property after death. Islamic law limits will-making to one-third of the estate; and Talmudic law also limits will-making (Atherton & Vines 1996: ch 2). Along with wills usually come inventories of property and, if one is lucky, death certificates and information about causes of death and families. The closer to the present we come, the more information is available and the easier it is to check.

A will can give an enormous amount of information. Wills can give information about who the testator thought was significant among his or her family and friends, what types of property were thought significant -- and indeed which types could pass on death, for example land, chattels, intellectual property and so on. Wills can also give information about what relationships were like between family members -- many wills say rude or loving things about people, such as 'To my wife I leave her lover and the knowledge that I wasn't the fool she thought I was' (quoted in Bright nd). It can be argued that wills might be used to establish what ideas about morality existed -- for example through the prevalence of *dum casta* (chastity) clauses or religious conditions or clauses in wills; wills might also indicate what obligations existed between people and were thought issues of honour, such as debt payment clauses in modern wills, or payment of missed tithes in early modern or mediaeval wills. For example in the Norfolk wills, some testators included clauses like these:

Item I give and bequeath unto the poore of Rowdham aforesaid iij s [shillings] iij d [pence] to be paied and distributed amongst them at the day of my buryall (Will of John Reve 1587).

Item I give for tythes forgotten to the highe auter [altar] in Rowdham 12 d (Will of Richard Watt 1553).

Wills might also indicate who was regarded as trustworthy or powerful by showing who is appointed as executor or trustee, rather than as a mere beneficiary of property. The question of executorship has frequently been considered as an indicator of men's rather than women's power, for example. Wills also give indications about wealth and the extent of property held by individuals.

Lloyd Bonfield was concerned about assumptions made by some historians that wills were 'faithful mirrors ... of family life' (1984: 639, referring to a statement by Joan Thirsk), able to show patterns of kinship, family structures, family relationships, the role of women, values and societal attitudes to those things. He argued that it was vital to be able to place the will in context in order to deduce valid conclusions from wills.

Where wills are considered on the basis that they are indicative of social values it is important to think carefully about the dating of the wills in relation to the development of values. There are a number of factors to consider. It has been quite common throughout the 20th century for people to make wills 20 or 30 years before they die, despite the contrary advice of their solicitors. Does that will indicate social values at the date of making the will or the date of death? If it indicates the deceased's values, can those values be accurately reflected back onto the society from which they come? How can we separate idiosyncrasy out from 'ordinary values' in wills, particularly when it is recognised by the common law that a person has the right to make a will as idiosyncratic or capricious as he or she pleases?

No man is bound to make a will in such a manner as to deserve approbation from the prudent, the wise or the good. A testator is permitted to be capricious and improvident, and is moreover, at liberty to conceal the circumstances and the motives by which he has been activated in his dispositions (Bird v Luckie per Knight Bruce VC at 378).

Associated with the question of how well wills reflect family or social life is the question whether the views expressed in the will can be attributed to the testator at all. In mediaeval and early modern times the priest wrote the will -- and no doubt it often reflected the priest's views rather than that of the testator. For example, the Norfolk wills have religious preambles (as almost all wills did up until about the 1920s). In 1558 one of these wills begins:

In the name of God Amen the 8th day of September and in the year of our Lord God 1558 I Thomas Ruddock the elder of Bridgham dwelling in the county of Norfolk being whole of mind and good of remembrance to God be praised do make this my last will and testament in this form following First I commend my soul into the hands of my lord God to our lady Saint Mary and all the holy company of heaven and my body to be buried in the church-yard of our lady in Bridgham aforesaid (Will of Thomas Ruddock 1558).

A slightly later will of 1586 seems to reflect a different view of religion:

In the name of god Amen; And in the eight and twentieth yeare of the raigne of our Soveraign Ladie Elizabeth by the grace of god Queene of England, Fraunce and Ireland etc / I John Sparke the elder of Rowdehame in the Countty of Norff husbandman and in the dioces of Norwich being of whole mynd and of good and perfecte remembrance thanckes be to Almighty god trustinge assuredlie that of his infinite goodness and mercie through the merrittes and passion of his deare sonne my Lorde and Saviour Jesus Christ hee will after the course of thys mortall life fulfilled receave my Soule unto the blessed reste of his eternall and everlastinge kingdome of heaven: And my bodie to be buried in the Churchyarde of Rowdeham aforesaide (Will of John Sparke 1586).

But whose faith is really reflected in these preambles (for a consideration of this issue see Litzenberger 1993)? These wills were written by the priest of the day who acted as scribe for almost all the wills made in the village. Only by comparing a large number of them is it possible to discern some patterns which would suggest which values came from the testator and which came from the priest. Studies which have examined these issues have noted that testators often paid less attention to the preamble than to the details of the gifts to be given (see, inter alia, Spufford 1972, Vann 1979, Hicks 1990). And the fact that monasteries were being closed down and the Marian burnings had happened in between the time of these two wills suggests that political correctness may well have been what is reflected in these two wills, rather than any deeply held religious convictions.

The two testators whose will preambles appear above came from the same village in Norfolk. They are separated by some 30 years -- but those 30 years were profoundly important for the Reformation in England. In the first will the testator commends himself to God and Mary the mother of Jesus Christ. This was a characteristically Roman Catholic way of considering religion. He then goes on to ask that his body be buried in the churchyard, that is, in sacred ground. Some people -- suicides and apostates -- could not be buried in sacred ground, nor could they make wills. ⁷ He also requests that mass for his soul be performed on the day of his burial. This mass was to assist his passage to Heaven. This reflects the dominant Christian view of death and the body in mediaeval times, which was based on a belief that the body and soul remained connected to each other after death and that prayers for the dead in between the time of death and the bodily resurrection at the end of time would make a difference to whether the deceased went to heaven or hell on the Last Day (Richardson 1988, Binski 1996). Thus having prayers said for one was extremely important. Before the Reformation prayers for the dead were said every day in every church. But after the Reformation praying for the dead actually became illegal ⁸ and a shift occurred from praying for the dead by referring them to the Virgin Mary to an emphasis on the importance of faith in the saving power of Jesus Christ as is demonstrated in the second fragment.

Today some wills are written by the testator but most are drafted by solicitors. What effect does that have on the attribution of the sentiments expressed? Do we end up with a study of the sentiments of will-drafters rather than testators? This might be something to consider, for example, if asking about a pattern of giving life estates to widows. It is tempting to conclude that husbands thought their wives should not have absolute gifts and should not be given much control of property and to conclude that they thought their wives were incompetent. However, an alternative conclusion might

be that solicitors have been taught to draft wills giving life estates to widows for tax or other purposes. Or a look at wills precedent books might show a preponderance of precedents including life estates and therefore be more likely to result in wills with life estates for widows. It is important to exclude alternative interpretations before holding one as definitive. In this context it is useful to know that the trends in family provision (testator's family maintenance) law in the 20th century shifted from one where provision for a widow was commonly limited to life estates or annuities rather than lump sums to a position where a lump sum was considered preferable. 9 The researcher's ability to consider all these possibilities increases the chance that the testator's authentic voice will come through.

The fact that wills are public documents creates some interesting anomalies. This is partly obscured by the fact that many people don't seem to know that wills are public documents, but for those that do some issues may arise which may foil the historical researcher. One of the most interesting ones is the possibility of a secret trust. A secret trust is one which arises when the testator has given property to a person in their will which is ostensibly an absolute gift. However, secretly the testator has required that person to hold it on trust for some-body else. The use of such a trust may completely obscure the actual terms of inheritance. This is particularly likely where a person has something to hide, such as a mistress.

At the same time, the public nature of a will means that values or ideas expressed in it may be 'sanitised' for public consumption. One version of this is the modern rule that the court will not admit scandalous or defamatory statements to probate and will delete them from the will (Will of O'Reilly, Estate of Hawke). Another version is that the public nature of the document may cause the testator to self-censor. Although it is true that some wills have forcefully expressed the testator's views about others, one should remain cautious about concluding that statements like 'my beloved wife' or 'my dear friend' indicate the depth of emotion on the testator's side.

Care needs to be taken in making assumptions about the relationship between the amount of property mentioned in an inventory and the wealth of the deceased. A will may mention all the property of the deceased, or it may mention only a tiny part. This will be affected by the legal regime. In some legal regimes the property which may be passed by will is limited to a certain amount, typically a third. This is true of Islamic law (Pearl 1987, Hussain 1999) and civil law systems. In the past in England some aspects of wealth were not mentioned because they were governed by other areas of law governing transmission of property on death such as feudal tenure. It is vitally important to understand other mechanisms in place -- we all know that one cannot conclude from the fact that a will of 1400 does not mention land that the deceased was not a landowner, since leaving land by will was prohibited in England until 1540 (Blackstone 1783: vol 2 ch 14).

Similarly, there is also the question of the extent to which inter vivos transmission of wealth has taken place before the death. In Australia in the 1990s superannuation became compulsory and a major area of wealth. Superannuation usually provides for a death benefit to be passed to a person nominated by the superannuant if they die before taking out a pension. But such superannuation in most cases is regarded as separate from the estate and may not be mentioned in a will at all because the act of joining a superannuation fund or indeed entering into life insurance for the purpose of

death benefits is not regarded as testamentary (*Baird v Baird*, *Re Danish Bacon Co*, *McFadden v Public Trustee for Victoria*). Thus the dialogue between the dead and the living in relation to wealth is now more likely to be carried out in two voices -- the voice of the will and the voice of the superannuation trustees, who take over and decide for themselves how death benefits will be distributed.

An understanding of the social and cultural context in which the wills were made is profoundly important to ensuring that valid conclusions are drawn. One study (Shammas et al 1987) compared wills in California and in Pennsylvania in the 1850s and noted that the Californians appointed women as executors for their husbands in some 80 per cent of cases, while in Pennsylvania women were rarely appointed executor. Did this mean Californians were more progressive even then? No, it meant that the only person the husbands had available from their family in California was their wife, because they had left their extended family behind in places like Pennsylvania. The conclusion that the status of women was higher in California than Pennsylvania could not be so easily drawn. Social context is always relevant and in that regard knowledge of social conditions such as class, education, patterns of agriculture, and many other things must be considered before making definitive conclusions about social issues from wills.

The legal context is also profoundly important to understanding what conclusions can be drawn from wills. The limitation of wills to personalty from Norman times until the 16th century was a profound limitation on their scope. After 1540 only some kinds of land could be left by will and different types of land became able to be passed by will at different times. From 1540 to 1660 land held in common socage and two-thirds of land held in knight's service could be devised (*Statute of Wills* 1540 32 Hen VIII c 1). In comparing wills with intestacy it may be significant to know how complex the validity requirements for formal wills were at various times. For example, under the *Wills Act* of 1540 a will merely had to be in writing, but it could not refer to land acquired after the will was made. If land was acquired after, a new will would have to be made to pass the newly acquired land. In 1677 the *Statute of Frauds and Perjury* changed the requirements so wills relating to land needed to be in writing, signed, and witnessed by three or four credible witnesses. The credibility of witnesses was stringently policed. Any interest at all in the estate or the outcome of the proceedings would disqualify a person as a credible witness, so the finding of three or four of them was not necessarily easy. Wills of personal estate could be made orally, and if for a value of over £ 30 they had to be proved by three or more witnesses and be written down within six days; wills of soldiers and sailors were exempt from formalities requirements; and there were highly specific methods of devising copyhold tenure land depending on the law of the manor from which it came. Some copyhold tenure could be devised; for other copyhold tenures passing by will was not possible. The *Law Commission Report on Real Property* (1833: 12 ff) (which ultimately gave rise to the 1837 *Wills Act* (UK)) identified 10 different sets of formal requirements for wills. In such circumstances the number of wills rejected for lack of conformity with the formalities would rise and hence intestacy would also increase.

In relation to married women it is important to understand the rules of marriage settlement, jointure and dower -- all of which might affect what was left in a will. Until the *Married Women's Property Acts* 10 married women were regarded at common law as lacking capacity to make wills. However, equity did allow the recognition of married

women's separate property. This was well established by the end of the 18th century but had been in existence for hundreds of years in various forms. These devices were commonly used by the wealthy to maintain property within a family. The strict settlement operated by granting a life estate to a husband with remainders in tail to male children. The wife would be given a jointure which was the provision for her after her husband died, and pinmoney, which was an income for her during his lifetime. If the wife did not have jointure, she would probably be entitled to dower, which was a one-third share in her husband's property after his death (Staves 1990, Atherton 1988). These factors all change the type of property that would be left by will, and it is important to recognise this when drawing conclusions about patterns of landholding and landgiving.

Between 1200 and 1857 in England there were jurisdictional divisions between common law and ecclesiastical law in relation to real property and personal property as they were played out in relation to testamentary causes. ¹¹ It was not until 1857 that the English Probate Court existed (Court of Probate Act 1857 (UK)). Before that wills were proved and contested in the church courts, the largest of these being the Archbishop of Canterbury's Prerogative Court. Wills could be proved in this court if their estate was worth more than £ 5 (Cox 1993). Lesser wills were checked in the archdeacon's or the bishop's courts. This means that any selection of wills from any court may well have an inbuilt selectivity for estates of a certain value. The fact that the church courts were considering wills may have affected the types of gifts, mention of mistresses or illegitimate children and so on. Although gifts of land in wills could not be determined by the church courts, the pronouncement of the church court on the validity of the will could be determinative of what happened in the common law courts later when the ownership of the land was determined.

By contrast some of the colonies, such as New South Wales had already combined ecclesiastical and common law jurisdiction with respect to probate by 1828 (Australian Courts Act 1828 (Imp)). Similarly considering the differences in the jurisdiction of the probate court as against the court of construction may help in understanding some problems of interpretation of wills (*Allen v M'Pherson*). Probate courts determine the validity of wills, while the equity division construes the will as the 'court of construction'. The rules of construction guide that interpretation, and therefore will have been considered by any professional will drafter when drawing up the will. A knowledge of these rules may assist researchers with interpreting the will.

Ethical issues

Research using wills is usually regarded as unproblematic by Ethics Committees, presumably on the basis that the human subject is dead. Ethics committees generally see research ethics as based on preventing the physical, mental or emotional abuse of subjects, and as maintaining the clients' interests over those of the researchers. In relation to human subjects, research ethics should also consider the need for subjects to be fully informed about the research and the risks they are undertaking and to be able to withdraw from the research at will. The protection from physical, mental or emotional abuse may give rise to ethical obligations of maintaining anonymity, confidentiality and privacy. ¹²

Charlesworth (1993) notes that western liberal societies emphasise the right of personal autonomy over almost all other rights. He notes that along with this such societies emphasise ethical pluralism, but generally do not have a determined set of core values which law is supposed to promote. For this reason ethical research generally requires the consent of a subject who is regarded as capable of consenting, who knows what is being consented to and, since the Nuremburg Code of 1948, is able to cease participation at will. None of these can apply to a deceased subject. However, there are some ethical issues associated with the use of wills, which may be exacerbated the closer the date of the will to the lives of living persons.

The general issues raised by research on human subjects still do arise in relation to wills research. In some ways it is more like carrying out research on animals than human subjects in that the subjects cannot speak for themselves. The issues of autonomy, confidentiality, privacy and consent are all worth considering.

Autonomy raises the issues of the possibility of consent. Obviously the deceased cannot consent, nor can he or she withdraw from the study at will. However, in 1964 the World Medical Association made the Helsinki Declaration in relation to human subjects. This allowed the possibility of consent by proxy for legally incompetent subjects. 13 The World Health Organisation Guidelines of 1992 allowed proxy consent but only in the most extreme circumstances. In the same way in Australian jurisdictions proxy consent for legally incompetent people is institutionalised in the form of guardianship boards and Protective Commissions. However, these usually apply only to living people. In relation to the deceased subject the question of proxy consent might arise, and perhaps in relation to the deceased him or herself, the consent of the Registrar of Probate might be regarded as sufficient. However, a further question may arise -- that is whether the subject of the research is only the deceased testator, or whether it includes all the people mentioned in the will and relatives of the deceased, some of whom may still be alive.

Wills are public documents once proved. However, this does not apply to the inventory and death certificate, which may have quite sensitive material included in them. The testator is dead, but family and friends may still be alive. If the family and friends are regarded as subjects should their consent be gained as well? What limits would be placed on this? Even if we don't go so far as to require the consent of people mentioned in the documents, privacy and confidentiality issues remain. This is particularly important in relation to the qualitative analysis of wills -- for example, in relation to conditional gifts. Beneficiaries may not be happy for it to be public that their parent only left a bequest on condition that they sent their children to church, or performed some service or only married a Jewish / Muslim / Protestant / Catholic person. Such conditions on gifts are quite personal, but they are very common in wills. Finch et al's study found that 35 per cent of wills had some condition on gifts (1996: 106) and in the New South Wales study a very similar pattern can be seen. 14

Associated with these ethical issues are some issues about cultural values. The statement above, 'The testator is dead, but family and friends may still be alive ...' itself reflects a cultural bias towards immediacy in time. Australian culture generally is relatively strongly focused on the present rather than the past. 15 However, many of our migrant groups and people of Aboriginal culture may be extremely concerned about research on generations much further back in time. There is a danger in

considering wills from the more distant past as well, that people in the present may be harmed in some way by the publication of data. The extent of family who might be regarded as affected may similarly be greater than the Western liberal tradition would suggest. Care and sensitivity thus need to be exercised, and identity should be protected where any concerns might arise. Using wills as research instruments is still a form of research on individual human subjects.

Conclusion

The testator speaks through the will to his or her intimates and to strangers who call the will by another name, 'data'. The will has a power of its own which derives from both its original purpose as a document which operates on the legal world to transfer property, but when the voice of the will is also from the past the will has the power to focus attention on many intimacies which without the will would be altogether lost. Such intimacy, borne of the details of ordinary life, can have an unexpected power of its own. Consider the echo down the ages of Shakespeare's gift of his 'second best bed' to his wife. As researchers we can respond with strict methodological parameters as a way of controlling misreadings. This is entirely valid; but we can also respond with a kind of cultural delicacy to the communication from another world, removed in space and time. Both these approaches help to protect the authentic voice of the will.

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Re Danish Bacon Co Ltd Staff Pension Fund Trusts [1971] 1 WLR 248

Re Z [1979] 2 NZLR 495

White v Barron (1980) 144 CLR 431

Will of O'Reilly [1927] VLR 553

Footnotes

1 This paper derives from a paper given at the Legal Intersections Workshop at the Faculty of Law, University of Wollongong, 30 November 2001. I would like to thank research assistants Trudi Aikin and Rebecca Salter for their invaluable work on the wills projects described in this paper.

2 From the Roudham Wills collection transcribed and translated by Peter and Miriam Barry. The original Wills are held in the Norfolk Records Office, Norfolk, England.

3 The NSW Probate Registrar has kindly given permission for this work to be done.

4 The Treatise was probably written, whether by Glanvill or not, in 1187-89.

5 The statistics are not entirely reliable since there is no requirement to say one is Aboriginal in a will, but Aboriginal Legal Services generally think there is a low level of will-making, and they are insufficiently funded to draft wills themselves. In a letter covering their submission on the Uniform Succession Laws Project to the WA Law Reform Commission in 1995 the Solicitor, Robin Ayres, noted that 'very few Aboriginal people make Wills in this State' (quoted by permission).

6 The canon law used the age of 14 for boys and 12 for girls, while in mediaeval and early modern times the common law age of majority varied according to the type of tenure between 14 and 21 (see Vines 1997: 129).

7 Swinburne 1590: 34 ff. The list of those excluded from testamentary competence was considerable: it included, for example, heretics, incestuous persons and sodomites.

8 Henry VIII made this illegal in 1529: 11 Ed VI, c 14 (1547). Chantries (places where one prayed for the dead) were abolished and the proceeds went to the Crown.

9 In New Zealand the period when life estates were given preference is called 'the Crewe era' after one of the cases which was so decided (*Re Crewe*). Later cases rejected this approach (eg *Re Z*); and in Australia the pattern was similar (*Gordon v Parkes* discusses this). However, these rules are not rigid -- each case is unique (*White v Barron*).

10 UK 1870 and 1874; NSW 1879 (42 Vict No 11); Vic 1884 (48 Vict No 828); Qld 1890 (54 Vict No 9); SA (including NT) 1884 (46 and 47 Vict No 300); WA 1882 (55 Vict No 20); Tas 1935 (26 GeoV No 90).

11 Holdsworth 1945: vol III. A statute of 1357 gave the Bishop's courts power to grant probate of wills: 31 Edw III st 1 c 11.

12 A large literature about research using human subjects exists. Only a tiny portion can be mentioned here, for example de Deyn 1994, American Psychological Association 1973, Charlesworth 1993.

13 There is an interesting debate on proxy consent in relation to children by McCormick 1974 and in reply Ramsay 1976.

14 Of all the wills in the sample 40 out of 114 had some kind of conditional gift.

15 See discussion of this cultural difference in time frames in Vines 1998.